***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

w/affidavit

# 75-4246

*To be argued by*
DENNISON YOUNG, JR.

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 75-4246**

GRACIELA ACEVEDO,

*Petitioner,*

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

*Respondent.*

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

## RESPONDENT'S BRIEF


ROBERT B. FISKE, JR.,
*United States Attorney for the Southern District of New York, Attorney for Respondent.*

DENNISON YOUNG, JR.,
*Assistant United States Attorney,*

THOMAS H. BELOTE,
*Special Assistant United States Attorney,*
*Of Counsel.*

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-4246

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GRACIELA ACEVEDO,

Petitioner,

- v -

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

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# RESPONDENT'S BRIEF

## Statement of the Issues

1. Whether the order of the Board of Immigration Appeals, affirming the decision of the Immigration Judge, and denying the petitioner's motion to reopen her deportation proceedings was an abuse of discretion.

2. Should damages and double costs be imposed on petitioner pursuant to Section 1912 of Title 28, United States Code, and Rule 38, Federal Rules of Appellate Procedure, inasmuch as this appeal is frivolous and appears to have been interposed merely to delay deportation.

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## Statement of the Case

Pursuant to Section 106 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a(a), Graciela Acevedo petitions this Court for review of the denial of her motion to reopen her deportation proceedings entered by the Board of Immigration Appeals (the "Board") on October 7, 1975. That order dismissed the petitioner's appeal from the order and decision of an Immigration Judge denying the alien's motion to reopen in order that she might apply for the discretionary relief of suspension of deportation under Section 244(a) of the Act, 8 U.S.C. § 1254(a). In sum, the Board found that Acevedo - an overstay non-immigrant alien - had failed to make a prima facie showing that she met all the criteria for Section 244(a) relief, in particular, that provision which requires a showing that it would be an "extreme hardship" on her, or a spouse, parent, or child, who is a citizen of the United States or a lawful resident alien, for her to be deported.

The petitioner contends that the Board's order should be set aside because the Board "disregarded the contents of the application for suspension of deportation" (Petitioner's Brief, Statement of the Issue, p. 1), and apparently because the Board should have permitted petitioner the opportunity "to develop the issues further at a reopened deportation hearing." (Petitioner's Brief, p. 5). This petition, seeking review of the

Board's order, was filed on November 12, 1975. Since the date of filing this petition, the alien has enjoyed the automatic statutory stay of deportation which accompanies a petition for review filed pursuant to Section 106 of the Act, 8 U.S.C. § 1105a.

Statement of the Facts

The petitioner is a 32 year old alien and a citizen and native of El Salvador who entered the United States on or about September 2, 1968 as a non-immigrant visitor (R, Ex. 5*). She was authorized to remain in this country until September 14, 1969. She remained beyond her authorized period without permission, however, and on February 6, 1975, deportation proceedings were instituted against her by the issuance of an order to show cause and notice of hearing. (R., Ex. 12). At that time a hearing was set down for February 20, 1975 but was adjourned to April 25, 1975. (R., Exs. 12 and 5). On February 20, 1975, Claude Henry Kleefield, Esq., entered his appearance with the Immigration and Naturalization Service ("INS") on the alien's behalf. (R., Ex. 11) After the April 25, 1975 hearing the Immigration Judge entered an order finding the alien deportable and granted her - on her

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* Hereafter "R" shall refer to the administrative record complied by the Immigration and Naturalization Service and filed with this Court; "Ex" shall refer to the numbered exhibits contained therein.

application - the privilege under Section 244(e) of the Act, 8 U.S.C. § 1254(e), of departing the United States voluntarily by July 24, 1975. In the alternative deportation to El Salvador was ordered in the event she failed to depart when required. No appeal was taken from that order of April 25, 1975, which accordingly became final. 8 C.F.R. § 242.20. (R., Exs. 10 and 5).

On July 23, 1975, one day prior to the expiration of her voluntary departure period, the alien, by her present counsel, moved to reopen the deportation proceedings for the purpose of applying for suspension of deportation under Section 244(a) of the Act, 8 U.S.C. § 1254(a).* (R., Ex. 7). In support of her motion, petitioner's counsel furnished a completed INS Application for Suspension of Deportation form, a completed INS Biographic Information form, two affidavits from individuals attesting to petitioner's good moral character, and another notice of the appearance of counsel on the petitioner's behalf. (R., Exs. 8 and 9). In addition to the standard background information, petitioner disclosed on the completed INS forms that she was a "Salvadorean" by nationality; that she entered the United States on a B-2 visa** granted in El Salvador; that despite her

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* Counsel's motion papers were actually received by INS on the day the alien was supposed to depart. (R., Ex. 7).

** "B-2" refers to the visa symbol relating to a nonimmigrant visitor for pleasure. See 22 C.F.R. §41.12.

visitor status she had been employed in the United States even after her authorization to be here lapsed; that she claimed to be married to an American citizen on June 13, 1973 in Passaic, New Jersey, whose birthdate she did not know and from whom she was actually separated;* that she admitted to not submitting yearly address reports as required by the Alien Registration Act; that she in fact could return to her country of birth; that she in fact would be able to arrange a trip outside the United States to obtain an immigrant visa; and that her father had died and her mother (presumably still in El Salvador) was not employed. The two brief affidavits submitted by petitioner's counsel, without supporting facts, merely conclude that the alien is of excellent moral character. No mention was made in any of these papers of any potential hardship on the alien in the event of her deportation.

On August 19, 1975 the Immigration Judge entered a written decision and order denying petitioner's motion to reopen. (R., Ex. 5). The decision noted that under 8 C.F.R. § 242.22 a motion to reopen must state the new facts to be proved at the reopened hearing and he concluded that these new facts failed to show not only the "7 year physical presence requirement for Suspension of Deportation but it also fails to show

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* On the second completed INS form the alien claims that the information concerning her spouse's birthdate, place of birth and date and place of marriage is "unknown".

that the respondent would suffer extreme hardship and qualify in all other respects for such relief."*. The Immigration Judge cited Matter of Sipus, Int. Dec. #2172 (BIA, 1972) in support of his conclusion.

On August 27, 1975 (received at INS on August 28, 1975) the alien's counsel appealed the August 19, 1975 decision to the Board. On his notice of appeal counsel merely stated that the applicant would be here seven years on September 3, 1975; and that a motion to reopen would be in order. He did not want to nor did he offer any written brief or statement in support of his appeal, but rather he offered the notation on his notice that "[h]ardship evidence will be submitted at hearing," and requested oral argument. (R., Ex.3)

On October 7, 1975 the Board affirmed the decision of the Immigration Judge denying the motion to reopen and dismissed the appeal. In so doing, the Board noted that while the alien appeared to have met the seven year requirement at the time the Board's decision was handed down, she failed to make a prima facie showing that she met the other requirements for Section 244 relief (Section 244 of the Act, 8 U.S.C. § 1254 - suspension of deportation), including extreme hardship. Oral

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* Section 244(a)(1), 8 U.S.C. §1254(a)(1), sets forth the necessary criteria for suspension of deportation. See Relevant Statutes, infra.

argument was denied pursuant to 8 C.F.R. § 3.1(e) and the appeal dismissed.*

A petition to this Court was filed November 12, 1975 by the alien's counsel, two days after the alien was to be deported (see Alien's Petition for Judicial Review, ¶ 9). On January 9, 1976 a pretrial conference was held before Nathaniel Fensterstock, Esq., Staff Counsel to Court of Appeals for the Second Circuit. Mr. Fensterstock's scheduling order directed that petitioner file his brief and appendix** by February 5, 1976 and that respondent's brief be filed by March 5, 1976.

Relevant Statutes

Immigration and Nationality Act, 63 Stat. 163 (1952) as amended:

Section 244(a), 8 U.S.C. § 1254(a), in pertinent part, provides:

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* The administrative record, exhibits 13 and 14, reflects further that the petitioner's alleged marriage appears to have been fraudulent. By her own admission, she offered her "spouse" $400 for this marriage of convenience and intended to obtain a divorce after becoming a resident of the United States.

** Perusing the appendix filed by petitioner we note copies of certain medical documents, tax returns, and a letter from a Rev. Birkle appear therein. These documents are of no consequence, but it is interesting to note that they do not appear in the administrative record. Other documents in the administrative record are conveniently omitted from petitioner's appendix.

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and--

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection*; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, child, who is a citizen of the United States or an alien lawfully admitted for permanent residence; or

(2) * * * * *

Title 28, United States Code, Section 1912.

Section 1912. Damages and Costs on affirmance. Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

Relevant Regulations

Title 8, Code of Federal Regulations:

§103.5 Reopening or reconsideration [before an Immigration Judge].

Except as otherwise provided in Part 242 of this chapter, a proceeding authorized under this chapter may be reopened or the decision made therein

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* Paragraph 2 of this subsection is not relevant for purposes herein.

reconsidered for proper cause upon motion made by the party affected and granted by the officer who has jurisdiction over the proceeding or who made the decision. ... If the officer who originally decided the case is unavailable, the motion may be referred to another officer. A motion to reopen shall state the new facts to be proved at the reopened proceeding and shall be supported by affidavits or other evidentiary material. A motion to reconsider shall state the reasons for reconsideration and shall be supported by such precedent decisions as are pertinent....

§242.22 Reopening or reconsideration [before an Immigration Judge]

Except as otherwise provided in this section, a motion to reopen or reconsider shall be subject to the requirements of §103.5 of this chapter. The special inquiry officer may upon his own motion, or upon motion of the trial attorney or the respondent, reopen or reconsider any case in which he had made a decision, unless jurisdiction in the case is vested in the Board under Part 3 of this chapter.... A motion to reopen will not be granted unless the special inquiry officer is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing;...

Relevant Rule

Federal Rules of Appellate Procedure

Rule 38. Damages for delay.

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

ARGUMENT

POINT I

THE BOARD OF IMMIGRATION APPEALS DID NOT ABUSE ITS DISCRETIONARY AUTHORITY IN DECLINING TO REOPEN THE DEPORTATION PROCEEDING TO PERMIT THE ALIEN TO APPLY FOR SUSPENSION OF DEPORTATION.

A. The reopening of a deportation proceeding is a matter of discretion.

The Immigration and Nationality Act contains no specific provision for the reopening of a deportation proceeding. The Attorney General, under his board grant of authority to administer and enforce the Act,* has promulgated regulations which permit reopening as a matter of discretion provided certain criteria are met. The applicable regulation, 8 C.F.R. § 242.22, with respect to motions brought before an Immigration Judge provides in pertinent part that motions to reopen "will not be granted unless the Special Inquiry Officer [Immigration Judge] is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing." Additionally 8 C.F.R. 103.5 provides that "motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits and other evidentiary material." See also with respect to the Board 8 C.F.R. §§ 3.2 and 3.8.

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* Section 103(a) of the Act, 8 U.S.C. § 1103(a).

Clearly, the regulations contemplate that a motion to reopen contain an offer of evidence, that the evidence be heretofore unobtainable, and that the evidence be sufficient to warrant the grant of the relief sought. Accordingly, the Immigration Judge and then the Board is required to evaluate any such offer of evidence against the background of the record already compiled in the alien's case. Where such evidence, even if accepted as true, would not justify a grant of the ultimate relief sought, it is obvious that no purpose would be served by reopening the proceeding. With this in mind, we now turn to examine the nature of the relief sought by this petitioner -- the reopening of a hearing for the purpose of applying for a suspension of deportation -- and the evidence she offered in support of her motion.

B. Suspension of deportation.

Suspension of deportation pursuant to Section 244(a) of the Act, 8 U.S.C. §1254(a), is the ultimate form of relief available to a deportable alien. An alien whose application is approved has his deportability cancelled and obtains status adjustment to that of a permanent resident without having to leave the United States. Authority to grant or deny this relief is vested within the sound discretion of the Attorney General. Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957). Those applications which are approved by the Attorney General must be referred to the Congress for final legislative approval.

Section 244(c) of the Act, 8 U.S.C. § 1254(c); McGrath v. Kristensen, 340 U.S. 162 (1950).

In order to qualify for suspension of deportation, an alien must first satisfy certain objective requirements contained in the statute. He must establish that he has been physically present in the United States for at least seven consecutive years immediately preceding his application, and that he had been a person of good moral character during that period. He must also convince the Attorney General that his deportation would result in extreme hardship to himself or to a close relative who is a citizen or resident alien of this country.*

The applicant for suspension of deportation has the burden of showing that he meets these prescribed conditions. 8 C.F.R. 242.17(d); Kimm v. Rosenberg, 363 U.S. 405 (1960), rehearing denied, 364 U.S. 854; Brownell v. Cohen, 250 F.2d 770 (D.C. Cir. 1957). If he fails to establish statutory eligibility, the application must be denied as a matter of law. Attainment of the statutory minimum, however, does not mean that relief will be automatically granted. The alien who satisfies the statutory requirements still has the burden of convincing the Attorney General that he merits the favorable

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* The qualifying relative must be the alien's spouse, child or parent. Section 244(a)(1) of the Act, 8 U.S.C. §1254(a)(1).

exercise of discretion. Hintopoulos v. Shaughnessy, supra; Wong Wing Hang v. Immigration and Naturalization Service, 360 F.2d 715 (2d Cir. 1966); Ng v. Pilliod, 279 F.2d 207 (7th Cir. 1960), cert. denied, 365 U.S. 860. Accordingly, when making her motion to reopen, it was incumbent upon this petitioner to offer evidence to show not only that she was statutorily eligible but that she merited the extraordinary relief she sought as a matter of discretion.

C. The evidence offered in support of the alien's motion to reopen did not warrant reopening.

The Immigration Judge before whom the motion to reopen was pending was obliged to weigh the facts before him against the requirements of Section 244(a) of the Act, 8 U.S.C. §1254(a), and Sections 103.5 and 242.22 of Title 8, C.F.R. In all, he had to determine whether the motion stated new facts to be proved at a reopened proceeding; whether those facts that were presented were material and were not available and could not be discovered or presented at the original hearing; and whether the alien made a prima facie showing that she had been in continuous residence for seven years prior to applying for suspension of deportation, that she was of good moral character and that her deportation would result in extreme hardship to her or a spouse, parent or child who was a citizen or resident of the United States. At the time of the Immigration Judge's decision it was clear that the alien

had not met the seven year requirement and that her deportation for that reason alone could not be suspended. It was equally clear from the evidence that she could not meet the extreme hardship test as well and he so stated in his decision. The alien was a young woman with no dependents, separated from her husband -- if indeed the marriage was bona fide* -- freely confessing that she was able to return to her native country and able to arrange a trip outside the United States to obtain an immigrant visa. There was no evidence suggesting, for example, any extreme economic and personal loss in the United States occassioned by her departure nor any difficulties awaiting her in El Salvador. None of the information submitted was sufficiently "material" to warrant reopening. Nor was there a showing that it was not available at the time of the original hearing. It was simply a matter of a nonimmigrant visitor enjoying the privileges and comforts of the United

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* See exhibits 13 and 14 of the administrative record.

** The extra-record material submitted by petitioner's counsel in his appendix -- the medical information, tax returns, etc. -- offer no further assistance. There is no support therein of "extreme" hardship. In fact the tax returns appear to evidence yet another violation of the immigration laws since it normally is a violation of the terms of a nonimmigrant visitor's visa to accept employment in the United States. 8 C.F.R. § 214.1; Londono v. Immigration and Naturalization Service, 433 F.2d 635 (2d Cir. 1970).

Nor at the time of the Board's de novo consideration of this matter was the evidence any more compelling. Petitioner's counsel had the opportunity to present additional material, if in fact any existed, but he decided to offer nothing further.* While petitioner may have resided in the United States for seven years by the time the Board ruled on the appeal, it was clear that she had not met the other necessary qualifications.**

In passing on cases within its jurisdiction, the Board is expressly authorized to exercise any of the Attorney General's authority and discretion appropriate and necessary to the disposition of a case. 8 C.F.R. §3.1(d). It has long been the practice of the Board to make its own determinations on questions of law and fact and on whether discretionary relief should be granted, Woodby v. Immigration and Naturalization Service, 385 U.S. 276, 278 n.2 (1966); DeLucia v. Immigration and Naturalization Service, 370 F.2d 305, 308 (7th Cir. 1966), cert. denied, 386 U.S. 912, and attorneys are charged with this knowledge. In the present case where

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* Counsel's notice of appeal (R., Ex. 3) merely states "hardship evidence" will be submitted at a hearing. He specifically declines to elaborate or submit a separate written brief or statement.

** The Board, too, noted that the petitioner failed to meet the other criteria, "including extreme hardship." (R., Ex. 1)

the regulations require an evaluation of proffered evidence before a motion to reopen can be granted, the Board properly exercised its discretionary authority in dismissing the appeal from the decision of the Immigration Judge.

The record of proceedings in this case is barren of any evidence demonstrating any outstanding equities in favor of this petitioner or showing that her deportation would result in an extreme hardship as that term is used in reference to Section 244(a) of the Act, 8 U.S.C. § 1254(a). The Immigration Judge and the Board absolutely did not abuse their discretion in denying a motion to reopen. Petitioner's audacious suggestion that she was denied "procedural due process in not being able to develop the issues further at a reopened deportation hearing" cannot be seriously considered. In all respects the deportation proceeding more than satisfied the requirements for procedural due process*, A hearing based on a written statement of the charges was held on notice to petitioner, whose counsel was fully appraised of the action. And indeed she was twice more afforded the opportunity to present any additional evidence in support

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* See generally Section 242 of the Act, 8 U.S.C. § 1254; Gordon and Rosenfield, Immigration Law and Procedure, Vol. 2, § 8.12b, p. 8-82.

of her plea. The evidence itself was insufficient to show any liklihood that petitioner could successfully prove the requisite extreme hardship at a reopened hearing and accordingly her motion to reopen was denied. The petitioner, of course, cannot require deportation proceedings be reopened merely by moving to reopen. If she could, she would be able to successfully frustrate the deportation procedure permanently. See Cheng Kai Fu v. Immigration and Naturalization Service, 386 F.2d 751, 753 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

This Court should not countenence further delay in deportation occasioned by procedural gimmickry. Petitioner knew she could not prevail on an application to suspend deportation when deportation proceedings were first initiated. She knew she had not met the seven year requirement (see Petitioner's brief, p. 3) and at that point, offered the privilege of voluntary departure, she should have left the country. Through counsel, she embarked, instead, on a course designed to frustrate the clear path that the law envisioned she was to take. Rather than fruitlessly appeal the initial Immigration Judge's decision, counsel, on the day before the alien was to deport, filed his motion to reopen. From this point forward it is clear the only purpose for using the regulatory processes was to delay departure until the seven year period had run, anticipating thereafter that hardship evidence presented might be sufficient

to allow the alien some modification of her status. As the record reflects, the information submitted was inadequate. Throughout, petitioner had full opportunity to present any evidence on hardship that she wished. In fact she availed herself of this opportunity before the Immigration Judge on the motion to reargue, and, after being appraised by the Immigration Judge that the information was inadequate, she could have and should have submitted more to the Board for its de novo review. None, however, was proffered. Counsel's claim now in Point III of his brief, that a "hearing on the application" was necessary, is misguided. Neither the Immigration Judge or the Board of Immigration Appeals is required to hold a hearing when reviewing a motion to reopen, Cheng Kai Fu v. I.N.S., supra; see 8 C.F.R. §§3.1(d)(1-a) and 3.1(e), nor should the Board exercise its privilege to request additional information from a petitioner in its de novo capacity when the information before it reveals no need for it. Indeed a deportation hearing was held in this instance on April 25, 1975 at which counsel for petitioner did attend. His failure to submit convincing hardship evidence during the many opportunities to do so is of his own making. Due process in every respect, was fully provided.*

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* Counsel for petitioner raises this due process argument in one sentence of Point III of his brief. The balance of that Point attempts to distinguish the Matter of Sipus which both the Immigration Judge and the Board cited in support of their decisions. For the convenience of the Court we annex to the Addendum hereto a copy of that decision. It clearly supports INS in this matter.

Petitioner's counsel now asks this Court to ratify his dilatory administrative tactics and force INS to re-evaluate the very material which it has already properly rejected. This should not be condoned. The petition should be dimissed.

D. Scope of review.

The only issue presented in this petition for review is whether or not the Board abused its discretionary authority in denying the petitioner's motion to reopen. As we have indicated, the grant or denial of a motion to reopen is discretionary. Novinc v. Immigration and Naturalization Service, 371 F.2d 272 (7th Cir. 1967). The scope of judicial review is extremely narrow. Muskardin v. Immigration and Naturalization Service, 415 F.2d 865 (2d Cir. 1969); Zupicich v. Esperdy, 319 F.2d 773 (2d Cir. 1963). Where, as here, the facts asserted by petitioner would not result in a grant of the relief sought, the denial of such a motion is not an abuse of discretion. Cheng Kai Fu v. Immigration and Naturalization Service, supra.

## POINT II

## THE PETITION HEREIN IS FRIVOLOUS. RESPONDENT SHOULD BE AWARDED JUST DAMAGES AND DOUBLE COSTS.

The instant action is frivolous. Given what we consider to be the evident insubstantially of grounds for this petition we submit that there can be no objective

reason for its filing other than to allow petitioner to enjoy the benefits of a further stay of deportation. Section 106a(a)(3) of the Act, 8 U.S.C. §1105a(a)(3).

Accordingly, damages and double costs should be awarded to the Government pursuant to the provisions of 28 U.S.C. § 1912 and Rule 38, Fed. R. App. P.* Such sanctions are of course discretionary with the Court and that discretion has been excercised only with the greatest of care. No case, however, in our opinion appears more compelling than this for the imposition for such sanctions. The inconvenience to the Court and respondent's counsel alone more than justify such award.

The Second Circuit has held that Section 1912 and Rule 38 sanctions may be imposed only on a "clear showing of bad faith." State of West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1092 (2d Cir.), cert. denied, 404 U.S. 871 (1971) (sanctions not imposed in that case); it is not premised merely on a showing of delay, but rather on doing justice between the parties and on "penalizing a party for unnecessarily wasting the time and resources of the Court." Flouro Electric Corporation v. Brandford Associates, 489 F.2d 320, 326 (2d Cir. 1973) (sanctions imposed) - citing to Advisory Committee Note to Rule 38 and NLRB v. Smith & Wesson, 424 F.2d 1072 (1st Cir. 1970).

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* Rule 20, Fed. R. App. P. makes Rule 38 applicable to petitions as well as appeals.

This case falls squarely within the standards set by this Court. On the merits, the case is a sham; nothing has ever been presented to suggest "extreme hardship" to the alien and this can only suggest the petition was filed in bad faith. Not only has this matter inconvenienced the Court but it has delayed improperly the deportation of the alien, who in the first instance had not even met the seven year requirement for initial consideration of suspension of deportation. The First Circuit in a strikingly similar situation, Panagoloulos v. Immigration and Naturalization Service, 434 F.2d 602 (1st Cir. 1970), observed

> The ordinary frivolous case merely consumes time, and inconveniences the court. A frivolous petition to review a deportation order stays the entire deportation procedure and affords immediate relief regardless of the insubstantiality of the claim." id. at 603-04

The Court in that case then suggested that counsel for the petitioner may have intended to abuse the process of the Court in order to obtain an undeserved benefit for his client and referred the matter to the United States Attorney for him to consider disciplinary proceeding.*

Courts with increasing caseloads should not be overburdened with trivia. Nor should their processes be

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* Disciplinary proceedings were brought against the counsel for a collection of misdeeds and sanctions were imposed. See In the Matter of Samuel A. Bithoney, Slip Op. annexed in Addendum hereto (1st Cir. 1973).

abused.* The Fourth Circuit in remanding a frivolous matter for the imposition of attorney's fees and the sanctioning of plaintiff's counsel, Gullo v. Hirst, 332 F.2d 178 (4th Cir. 1964), commented aptly:

> While we must be careful to assure that courts are always open to complaining parties, we have an equal obligation to see that its processes are not abused by harassing or by recklessly invoking court action in frivolous causes or by foot dragging and delaying in order to deny or postpone the enjoyment of unquestioned rights. Lawyers have an obligation as officers of the court not to indulge in any of these practices. Vexatious litigation and the law's delays have brought the courts in low repute in many instances, and when the responsibility can be fixed, remedial action should be taken. id. at 179.

The petitioner has abused the process of the INS and of this Court. We submit that damages and double costs would be an appropriate award to respondent pursuant

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* We ask the Court to judicially notice the increase in Immigration petitions filed in the Second Circuit. The records of the United States Attorney's Office reflect that there were approximately

> in 1972 - 25 petitions filed
> in 1973 - 38 petitions filed
> in 1974 - 37 petitions filed
> in 1975 - 92 petitions filed (10 in January and February)
> in Jan. and Feb. 1976 - 14 petitions filed

We of course do not suggest all petitions are frivolous. What we do suggest is that when frivoulous petitions are filed, they should be dealt with appropriately.

to 28 U.S.C. §1912 and Rule 38, Fed. R. App. P.* See, e.g., Fluoro Electric Corporation v. Branford Associates, supra., (appellee was awarded damages in the amount of $4500 and costs in the amount of $589.70 by the Second Circuit citing Rule 38); Oscar Gruss & Son v. Lumbermens Mutual Casualty Co., 422 F.2d 1278, 1283-84 (2d Cir. 1970) (Second Circuit awarded four per cent interest on judgment, double costs and $7500 in attorneys fees citing both Section 1912 and Rule 38); N.L.R.B. v. Smith & Wesson, 424 F.2d 1072 (1st Cir. 1970) (First Circuit citing Rule 38 awarded governme agency $500 for expenses in addition to its regular costs); Gullo v. Hirst, supra, (Fourth Circuit remanded for imposition of attorney's fees and sanctioning of plaintiff-appellant's counsel); Ginsburg v. Stern, 295 F.2d 698 (3rd Cir. 1961) (Third Circuit citing Section 1912 awarded to appellee costs and $500 on account of coun el fees and other expenses); Lowe v. Willacy, 239 F.2d 179 (9th Cir. 1956) (Ninth Circuit citing Section 1912 awarded appellee double [court] costs, attorney's fees and printing costs, the latter two amounts

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* The awarding of costs could, of course, be imposed on petitioner's counsel. 28 U.S.C. §1927. Should the Court wish to pursue this alternative it might be appropriate to first conduct a hearing. See Hanley v. Condrey, 467 F.2d 697, 700 (2d Cir. 1972).

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to be shown by appellee's affidavit to be filed with the Clerk); In re Midland United Co., 141 F.2d 692 (3rd. Cir. 1944) (Third Circuit awarded appellees damages for printing costs and $1000 for counsel fees citing Section 878, the precursor to Section 1912). At such time as the Court may direct we will submit an itemization of our costs and the attorneys' time expended on this case.

CONCLUSION

It is respectfully requested that the petition herein be dismissed and that the respondent be awarded damages and double costs occassioned by the defense of this action.

Dated: New York, New York

March , 1976.

Respectfully submitted,

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Southern District of New York
Attorney for Respondent

DENNISON YOUNG, JR.
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THOMAS H. BELOTE
Special Assistant United States Attorney

- Of Counsel -

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# A D D E N D U M

MATTER OF SIPUS

In Deportation Proceedings

A-14293683

Decided by Board November 10, 1972

(1) A mere showing that an alien has achieved the minimum statutory period of continuous physical presence for suspension of deportation does not, without more, justify granting a motion to reopen the deportation proceedings to permit an application for suspension.

(2) A motion to reopen the proceedings should disclose all prior and pending judicial litigation in the case.

CHARGE:

Order: Act of 1952 - Section 241(a)(2) [8 U.S.C. 1251(a)(2)] - Non-immigrant visitor - remained longer than permitted.

ON BEHALF OF RESPONDENT:
Hiram W. Kwan, Esquire
840 North Broadway
Los Angeles, California 90012
(Brief filed)

ON BEHALF OF SERVICE:
William S. Howell
Trial Attorney

This is an appeal from an order of a special inquiry officer denying the respondent's motion to reopen the deportation proceedings to allow her to file an application for suspension of deportation under section 244 (a)(1) of the Immigration and Nationality Act. Oral argument, which is requested, is no longer available as a matter of right on such an appeal, 8 C.F.R. 3.1(e). Oral argument will be denied and the appeal will be dismissed.

Respondent is a 51-year-old married female alien, a native and citizen of the Philippines, who was admitted to the United States on July 26, 1965 as a nonimmigrant visitor and remained longer than permitted. At a hearing before a special inquiry officer on January 28, 1969, she admitted the factual allegations of the Order to Show Cause, conceded deportability and applied for voluntary departure. The special inquiry officer found her deportable and granted voluntary departure to March 1, 1969. She failed to depart.

On April 29, 1972, counsel filed a motion to reopen the proceedings so that respondent might file an application for suspension of deportation. Attached to the motion was a filled-out suspension application. The motion to reopen, which is unsupported by any affidavit or other evidence, is extremely brief. Its essence is contained in two short paragraphs:

> "[III] Respondent is statutorily eligible for suspension of deportation having first entered the United States in March 1962. It is believed her case falls squarely within 12 I & N Dec. 271.
>
> "[IV] Counsel is prepared to present the necessary evidence at the time of hearing."

The suspension application recites that respondent first entered the United States as a visitor on March 27, 1962 and was absent thereafter but once, from December 1964 to the date of her last entry on July 26, 1965. The Service's trial attorney opposed the motion on the ground that this absence of almost eight months broke the continuity of the seven years' physical presence required by section 244(a)(1) of the Act. The special inquiry officer agreed and denied the motion in his order dated May 23, 1972, now before us on appeal.

The issue raised on appeal is now moot. More than seven years have now elapsed since respondent's last entry on July 26, 1965. We therefore need not consider whether her preceding absence broke the continuity of her physical presence following the 1962 entry. Since she can now establish the minimum required period of physical presence, we would ordinarily reopen and remand if her motion papers made out a prima facie case for reopening in other regards. In our view, they do not.

The motion to reopen, as we have noted, is singularly lacking in factual detail. The suspension application reflects that respondent's husband, whom she married on December 24, 1942, is a self-employed farmer in the Philippines. Respondent's five children, ranging in age from 9 to 27, are natives and citizens of the Philippines and presumably now reside there since their present residence is not indicated. Neither the husband nor any of the children is listed as a permanent resident alien. Respondent also lists six brothers and sisters, all natives and citizens of the Philippines, now also presumably residing there. Since December 1966 respondent has been employed as a domestic and now earns $125 a week. She states she cannot return to her native land because of "financial hardship."

As we pointed out in Matter of Lam, Interim Decision 2136 (BIA 1972), continuous physical presence for the minimum statutory period is only one of the eligibility requirements for suspension of deportation. There are others, including a showing that the alien's deportation would result in extreme hardship to the alien or other specified family members who are citizens or legally resident aliens. The pertinent regulations 1/

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1/ Reopening before the Service is governed by 8 C.F.R. 242.22 and 103.5. Reopening before the Board is governed by 8 C.F.R. 3.2 and 3.8.

require that a motion to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material.

No hard and fast rule can be laid down as to what constitutes a sufficient showing of a prima facie case for reopening. Much depends on the nature of the case and the force of the evidence already appearing in the record sought to be reopened. Where that record is negative or contains adverse factors, a mere statement of conclusory allegations with respect to the statutory prerequisites is seldom enough. Where reopening for suspension purposes is sought, a mere showing that the alien has at last achieved the minimum statutory period of continuous physical presence does not ordinarily, without more, establish the other statutory prerequisites sufficiently to warrant reopening for a plenary hearing. On the other hand, we have on occasion overlooked the technical inadequacy of a motion to reopen where the new facts alleged, when coupled with the facts already of record, satisfy us that it would be worthwhile to develop the issues further at a plenary hearing on reopening.

On the record now before us, we cannot infer from the mere fact that respondent can now establish seven years' continuous physical presence that she may also be able to prove the prerequisite extreme hardship if given a chance at a reopened hearing. From what already appears, it is clear that all her close relatives are in the Philippines. Respondent's deportation there, far from causing extreme hardship by separating her from her family, would serve to reunite her with them. Insofar as concerns the "financial hardship" which she asserts in her application, it has been consistently held that mere economic detriment, without more, is not enough to make out the extreme hardship required by the statute, Kasravi v. INS, 400 F.2d 675 (9 Cir. 1968); Kwan Shick Myung v. INS, 368 F.2d 330 (7 Cir. 1966).

If there are other facts in counsel's possession which would tend to make out a case of extreme hardship, he has not made them known. The special inquiry officer cannot be expected to act on conjecture. Counsel's unsupported and conclusory assertion in the motion that he "is prepared to present the necessary evidence at the time of hearing" does not tell us or the special inquiry officer what evidence he is prepared to present and does not satisfy us that the additional delay entailed in a reopening would likely be worthwhile. We conclude that the special inquiry officer properly denied the motion to reopen.

One further aspect of this case should be mentioned. From the record now before us, it appears that on May 11, 1972, after he had filed the motion to reopen but before the special inquiry officer had ruled on it, counsel for respondent filed a petition under section 106(a) of the Immigration and Nationality Act to review the original deportation order, Sipus v. INS, 9 Cir. No. 72-1833. On June 16, 1972, the court entered an order dismissing the petition for review and dissolving the statutory stay of deportation automatically available under section 106(a)(3) of the Act. On June 21, 1972, counsel petitioned the court for rehearing. In his supporting memorandum, counsel challenged the special inquiry officer's order now before us on appeal and argued, on the "extreme hardship" issue, that "[Respondent], at the age of 51 and with no recent employment history in her native country, would experience extreme difficulty in finding work of any kind if she were deported to the Philippines." On June 28, 1972 the court denied the petition for rehearing.

We mention the court proceedings for two reasons: First, in court counsel went into considerably more detail in defining the extreme hardship claim than he did either before the special inquiry officer or before this Board on appeal. Even with these additional details, we are satisfied that a prima facie case for reopening is not made out.

Second, we note that neither in his notice of appeal dated June 3, 1972, nor in his brief on appeal to this Board bearing the same date, did counsel mention the proceedings for judicial review then pending. We have previously pointed out how important it is that we be informed of court litigation brought by a party to a proceeding before us which might affect our decision in that proceeding. See Matter of Wong, Interim Decision 1971 (BIA 1969); 8 C.F.R. 3.8(a). Prior litigation is important because, among other things, the judgment entered therein may have res judicata effect. It is equally necessary that we be informed of pending litigation, so that we may either withhold or shape our decision in such a way as not to impinge upon the jurisdiction of the court. If counsel deliberately withheld this information from us, we could only regard it as a lack of the good faith which we are entitled to expect from attorneys who appear before us.

We have no reason to believe that either of the Ninth Circuit's judgments has conclusive effect on the issue now before us. The petition for review dismissed by the court's order of June 16, 1972 dealt with the original deportation order and not the special inquiry officer's order now before us. While counsel sought to draw the latter order into the court proceedings in his petition for rehearing, it is clear that he did not succeed. In denying the petition for rehearing, the court wrote no opinion. It is fairly inferable, however, that the court's refusal to entertain respondent's challenge to the special inquiry officer's order was due to respondent's failure to exhaust her administrative remedy of appeal to this Board, as required by section 106(c) of the Act. We see no reason to regard the court's order of June 28, 1972 as an adjudication on the merits of the issue now before us. Accordingly, we shall enter an order disposing of the appeal before us on its merits.

ORDER: The appeal is dismissed.

Warren R. Torrington, Member, Concurring:

I concur in the result, but not in the unnecessary, inaccurate, and misleading statements which appear in the following paragraph quoted from the Board opinion.

> "No hard and fast rule can be laid down as to what constitutes a sufficient showing of a prima facie case for reopening. Much depends on the nature of the case and the force of the evidence already appearing in the record sought to be reopened. Where that record is negative or contains adverse factors, a mere statement of conclusory allegations with respect to the statutory prerequisites is seldom enough. Where reopening for suspension purposes is sought, a mere showing that the alien has at last achieved the minimum statutory period of continuous physical presence does not ordinarily, without more, establish the other statutory prerequisites sufficiently to warrant reopening for a plenary hearing. On the other hand, we have on occasion overlooked the technical inadequacy of a motion to reopen where the new facts alleged, when coupled with the facts already of record, satisfy us that it would be worthwhile to develop the issues further at a plenary hearing on reopening."

They might create the--wrong--impression that we have the right to ignore the regulations which govern motions to reopen, and which are cited in footnote 1 of the Board opinion. We have no such right. The regulations have the force of law; and it is our duty to enforce them. Thus, "a mere statement of conclusory allegations with respect to the statutory prerequisites" for the relief sought is not "seldom enough;" it is <u>never</u> enough. The quoted dictum is in sharp conflict with the letter and

spirit of the clear provisions of the pertinent regulations. Section 3.8 of Title 8 of the Code of Federal Regulations expressly provides in subsection (a) as follows: "..... Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material....." [Emphasis supplied.] Almost identical provisions govern motions to reopen directed to an officer of the Service and, in particular, in deportation proceedings to a special inquiry officer. 8 C.F.R. 103.5 and 8 C.F.R. 242.22.

Similarly, where "reopening for suspension purposes is sought, a mere showing that the alien has at last achieved the minimum statutory period of continuous physical presence does not" ever, "without more, establish the other statutory prerequisites sufficiently to warrant reopening for a plenary hearing." The use of the word "ordinarily" in the Board opinion appears to me to be quite misleading.

Finally, the following statement quoted from the Board opinion is far too broad and general, and is therefore not a correct exposition of what we can lawfully do: "On the other hand, we have on occasion overlooked the technical inadequacy of a motion to reopen where the new facts alleged, when coupled with the facts already of record, satisfy us that it would be worthwhile to develop the issues further at a plenary hearing on reopening."

Obviously, a motion to reopen will always be granted where a failure to reopen the proceedings might result in a gross miscarriage of justice. For example, in a matter involving an alien's application for withholding of deportation to a country in which he allegedly would be subject to persecution on account of race, religion, or political opinion, neither a special inquiry officer nor this Board would dream of denying a motion to reopen because of some "technical inadequacy" (as the Board opinion puts it). That, however, does not mean that we have the general authority to "overlook" clear violations of, or non-compliance with, the applicable laws and regulations of the United States.

# United States Court of Appeals
## For the First Circuit

No. 71-1114 Original

IN THE MATTER OF
SAMUEL A. BITHONEY

ON PETITION FOR DISCIPLINARY ACTION

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*.

*Lawrence P. Cohen*, Assistant United States Attorney, with whom *James N. Gabriel*, United States Attorney, was on brief, for petitioner.
*John P. White, Jr.*, with whom *Crane, Inker & Oteri* was on brief, for respondent.

October 23, 1973

COFFIN, *Chief Judge*. This is an original proceeding to determine whether disciplinary action should be taken against Samuel A. Bithoney, a member of the bar of this court. On April 9, 1971 the United States Attorney for the District of Massachusetts filed a Petition for Disciplinary Action against respondent, and an Order to Show Cause was issued by this court on the same day. After respondent had filed an answer, these proceedings were stayed during the pendency of a criminal action instituted against respondent in the United States District Court for the Western District of New York on an unrelated matter. Upon final disposition of that criminal action, the stay in these proceedings was vacated, the Petition for Disciplinary Action having been amended to reflect respondent's conviction on a criminal charge, and a hearing was held before this court on September 11, 1973, at which hearing oral arguments were heard and sworn testimony was taken.

## I — Facts

On November 25, 1969 respondent filed in this court Petitions for Review in the cases of *Angelo Coviello* v. *INS* (No. 7472), *Luciano Pino and Rosa Pino* v. *INS* (No. 7473) and *Raffaele Iacadoro* v. *INS* (No. 7474). In all of these immigration cases the effect of the filing was to cause an automatic stay of deportation under the provisions of 8 U.S.C. § 1105a(a)(3). In each case the government moved for summary judgment and the subsequent course of events is described in our Memorandum and Order entered on January 20, 1970:

> "[The government's] motions to dismiss with accompanying memoranda were filed in the above three cases on December 23, 1969. No response having been received from counsel for the petitioners [Mr. Bithoney], the Clerk, at the court's instruction, notified counsel that the motions would be granted unless memorandum in opposition thereto was presented by 10:00 A.M. January 9, 1970. Instead of presenting a memorandum in opposition counsel filed, late, on January 12, motions for leave to file answers late. On said date counsel was again notified that there was required a legal memorandum showing legal cause, supported by authorities, why the motions to dismiss should not be allowed, said memorandum to be filed by January 19, by the Clerk. Nothing has been forthcoming.
>
> "The motions to dismiss are allowed on the merits, and alternatively they are allowed for want of diligent prosecution by petitioners."

We then went on to warn:

> "This court does not propose to have appeals taken simply for the purpose of staying an enforcement of immigration orders, and when prosecution is not diligently pursued, the court presumes that this was the purpose."

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On March 12, 1970 respondent filed a Petition for Review in the case of *Rocco D'Allesio et al.* v. *INS* (No. 7566). As in the three prior cases deportation was automatically stayed. Again the government's motion for summary judgment elicited no opposing memorandum of law and the petition was dismissed. The petition was found "totally lacking in merit".

On August 5, 1970 respondent filed two more petitions for review in immigration cases, causing stays in deportation. On this occasion a prehearing conference was held and at the specific request of the court Mr. Bithoney submitted a memorandum of law supporting his clients' position. The court concluded that the petitions were "patently frivolous" and granted summary judgment for the government on November 12, 1970. In the opinion in that case we made the following observation:

> "One final matter. In the case of petitioner Lucia D'Allesio lack of merit in the claim was fully and finally adjudicated by this court in an earlier proceeding. In addition, counsel has been expressly warned in the order in another proceeding of the seriousness of filing frivolous petitions under this statute. The ordinary frivolous case merely consumes time, and inconveniences the opposite party and the court. A frivolous petition to review a deportation order stays the entire deportation procedure and affords substantial immediate relief regardless of the insubstantiality of the claim. In the light of this warning, and possibly even without such caution, considering the total clarity of the statute, it may be that counsel deliberately intended to abuse the process of this court in order to obtain an undeserved benefit for one or all of his clients. We refer this question to the U. S. Attorney to institute disciplinary proceedings if he believes it appropriate." [Footnote omit-

ted.] *Panagopoulos* v. *Immigration and Naturalization Service,* 434 F. 2d 602, 603-604 (1st Cir. 1970).

On August 21, 1970 respondent filed one, and on August 26, 1970 two more, petitions for review in immigration cases. In all three cases this court granted summary judgment for the government and ordered that mandate issue immediately "because of the total frivolousness" of the petitions.

On January 8, 1973 respondent's conviction on two counts of aiding and abetting the making of a false acknowledgment (in violation of 18 U.S.C. §§ 2, 1015), a felony, was affirmed, *United States* v. *Samuel A. Bithoney,* 472 F.2d 16 (2d Cir. 1973), and certiorari was denied on June 11, 1973, — U.S. —, 41 U.S.L.W. 3644.

II — Issues Presented

The government in its Petition for Disciplinary Action urges that respondent Samuel Bithoney has violated his oath as a member of this court's bar, taken pursuant to F.R.A.P. 46(a), in that he did not "demean [him]self uprightly and according to law". The government also urges that respondent has been "guilty of conduct unbecoming a member of the bar of the court", which, under F.R.A.P. 46(b), is grounds for suspension or disbarment from the bar of a court of appeals, and under F.R.A.P. 46(c) is grounds for other "appropriate disciplinary action" against anyone who practices before the court. Two separate reasons are given by the government for a finding that respondent should be punished pursuant to F.R.A.P. 46. The first is his course of conduct in filing nine petitions for review in immigration cases in nine months, all of which were found to be frivolous, not diligently pursued, or both, and six of which were filed after this court's explicit warning in *Angelo Coviello* v. *INS.* The second reason is Mr. Bithoney's felony conviction for aiding and abetting the making of a false acknowledgment.

Respondent defends, first, on the grounds that his con-

duct in filing the immigration appeals cannot constitute a violation of the obligations of an attorney as defined in F.R.A.P. 46, even though all of them were found by the court to be frivolous, in view of an attorney's obligation to his clients to represent them "zealously". Second, respondent urges that even if his conduct violated Rule 46, that rule is so vague that its enforcement violates due process. Respondent also disputes the propriety of disbarring him because of his felony conviction, contending that his offense was such that disbarment is not warranted.

III — Discussion

We find first that respondent's behavior in filing the immigration appeals was improper and worthy of disciplinary action. Out of nine petitions for review not one was found to contain even a semblance of merit. And as we pointed out in *Panagopoulos, supra,* 434 F.2d at 603-604, such frivolous claims not only waste the time of the court and of the opposing party, but also, because of the operation of the immigration laws, confer an automatic and immediate benefit upon one who may not in the least deserve it. Furthermore, six of these cases were filed in the teeth of our warning in *Coviello.*

Respondent reminds us of the injunction of Canon EC 7-1, of the Code of Professional Responsibility, that a lawyer must represent the interests of his client "zealously". The mere finding that a position advanced was frivolous must not be cause for discipline of the attorney because of the danger that such action might inhibit the bar from the most vigorous advocacy of clients' positions and thus restrict meaningful access to the court. Furthermore, an attorney would face an intolerable dilemma when the needs or instructions of his client would force him to argue a position which he personally may feel to lack merit, and which could lead to punitive action against him by the court.

Sensitivity to these considerations requires that we in-

dulge every presumption in favor of the attorney who presents or defends a position which is found to lack support. We must insure that there is breathing room for the fullest possible exercise of the advocacy function. But there must be limits. Canon EC 7-1 states that the duty of a lawyer is to represent his client zealously, but only "within the bounds of the law". The processes of this court are made available for the general good; to the extent that they are abused they become less available to those genuinely in need of them.[1] Such abuse also lowers public esteem for the judicial system and, particularly in the situation presented here, can unjustifiably result in unmerited benefit.

With these considerations in mind, we find that respondent has abused the processes of this court by lodging appeals of patent frivolity, under the circumstances shown above. Whether we question his good faith is not determinative; his course of action was so clearly and flagrantly in violation of the proper behavior of a member of the bar of this court that it represents at a minimum such gross negligence that punitive action is indicated.

Even at this point we might hesitate to take disciplinary action, sensitive to even the slightest possibility of casting an inhibitory shadow upon the ardor of those who practice before us. But even more serious, in our view, was

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[1] As pointed out by the court in *Gullo* v. *Hirst*, 332 F.2d 178, 179 (4th Cir. 1964):

"While we must be careful to assure that the courts are always open to complaining parties, we have an equal obligation to see that its processes are not abused by harassing, or by recklessly invoking court action in frivolous causes or by foot dragging and delaying in order to deny or postpone the enjoyment of unquestioned rights. Lawyers have an obligation as officers of the court not to indulge in any of these practices. Vexatious litigation and the law's delays have brought the courts in low repute in many instances, and when the responsibility can be fixed, remedial action should be taken.

"We remand this case to the district court with instructions that it tax the plaintiff with reasonable counsel fees for the defendants' attorneys and that it visit a proper sanction upon the plaintiff's counsel."

respondent's complete failure to diligently pursue prosecution of four of the appeals. Such behavior represents a breach of duty not only to the court, but also to the client, who justifiably expects his counsel to present his claims with utmost vigor, let alone with sufficient promptitude to avoid loss of valuable rights through default. The record indicates that the court indulged Mr. Bithoney every reasonable opportunity to fulfill the obligations of one who appeals to the court, but that respondent utterly failed to do so.[2] Such action—or, precisely, inaction—removes all doubt as to the propriety of imposing discipline in his case. We fail to see how such inaction can be protected by the need to "zealously" defend a client's interest. Rather we see this as a default in his duty to his clients, an additional reason for punishment, rather than a defense.

At the hearing respondent testified to a physical impairment affecting his eyesight during the period in question, requiring him to utilize his son, who is not a member of the bar, to aid him in his legal work. While we have considerable sympathy for respondent's hardship, we have little sympathy for his use of this hardship as a defense. If Mr. Bithoney was so ill as to preclude effective legal representation then his failure to take meaningful steps to have such representation provided by alternate means

[2] Respondent's efforts on behalf of his clients in the five other cases can at best be regarded as minimal. In two of these cases a memorandum of law opposing summary judgment was filed, but only at the express instruction of the court. In the last three appeals briefs were filed which can only be described as feeble efforts. In two of them the sole ground for relief presented was the assertion that deportation would cause hardship because of "Communistic influence" in the areas where the individuals were to be sent. The areas were Greece and Guatamala.

amounts to a serious breach of his obligations to his clients,[3] as well as to the court.

An interesting issue is raised by respondent's claim that F.R.A.P. 46 is so vague that its enforcement against him would be a denial of due process.[4] There is no question but that attorney discipline proceedings are subject to due process scrutiny. *In re Ruffalo*, 390 U.S. 544 (1968). Indeed, in view of the gravity of the punishment which may be meted out pursuant to F.R.A.P. 46, which includes stiff fines,[5] or even suspension or disbarment[6] with all of the consequential damage which that entails, the test which must be employed as to the constitutionality of the disciplinary machinery to be used must be a very severe one. There has been considerable discussion both within and without the ranks of the legal profession of the need for tightened disciplinary rules and more vigilant enforcement. While we support such efforts we do not think that there is any inconsistency between that laudable goal and the equally important goal of providing the strictest possible due process standards for the procedures used to carry out necessary bar discipline.

The question presented is whether the terms used in F.R.A.P. 46, i.e., "demean [him]self uprightly and accord-

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[3] Respondent testified that he informed his clients of his physical problem but that they declined to seek new counsel. We cannot but be skeptical of the ability of those who have only resided in this country a short time to make an effective choice in this matter. Further, there comes a point when an attorney can no longer rely on the failure of his clients to seek alternative counsel, and must withdraw from active representation until physically able to fulfill his obligations to court and client.

[4] We understand respondent does not allege that he was denied notice of the particular charges lodged against him or that he was not afforded an adequate opportunity to be heard.

[5] *See, e.g., In re Winsberg*, 446 F.2d 641 (9th Cir. 1971).

[6] *See, e.g., In re Chandler*, 450 F.2d 813 (9th Cir. 1971).

ing to law", and "conduct unbecoming a member of the bar", are "in terms so vague that men of common intelligence must necessarily guess at its application", *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926), and thus deny due process when used as the basis for a disciplinary proceeding.

In the abstract, respondent may have a colorable claim that the terminology of F.R.A.P. 46 is so indefinite as not to afford sufficient warning of the behavior which is proscribed. But we are convinced that when placed in context, as part of a rule directed to a discrete professional group, the terms take on definiteness and clarity. The legal profession has developed over a considerable period of time a complex code of behavior and it is to that code that such words as "conduct unbecoming a member of the bar" refer. In addition, the American Bar Association has promulgated a Code of Professional Responsibility which embodies in considerable detail the standards of behavior currently expected of members of the bar.[7] Disciplinary Rule 7-102(A)(2) of the Code provides that:

> "(A) In his representation of a client, a lawyer shall not:
>
> * * * *
>
> "(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense, if it can be supported by good faith argument for an extension, modification, or reversal of existing law."

Under these circumstances a member of the bar, like respondent, cannot complain that there is not at least a core area of clearly prohibited conduct which the words

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[7] We refer to the Code only as an illustration of the lore of the profession, which we assume is familiar or should be to all attorneys. *See also* Canon 15 of the older Canons of Professional Ethics.

"uprightly and according to law" and "conduct unbecoming a member of the bar" mean to him.[8]

Whatever ambiguity may remain in the terms of F.R.A.P. 46 after application of the customs and commonly accepted usages of the legal profession, respondent is not in a position to complain of them. In our Memorandum and Order disposing of the petition which he had filed in the *Coviello* case, we directly and specifically warned respondent that continued abuse of our process by the filing of immigration appeals solely for the purpose of achieving delay in deportation orders would constitute improper conduct on his part. In continuing this course of conduct by filing six more petitions for review respondent ran afoul not only of the general proscriptions of F.R.A.P. 46 but of our warning to him. Mr. Bithoney did not have to guess as to the conduct which would lead to sanctions against him; that unfairness which is the essence of the vagueness doctrine just did not occur in his case.[9]

Therefore, we conclude that there is no merit to the defense of denial of due process due to the alleged vagueness of F.R.A.P. 46.

Mr. Bithoney's criminal conviction raises a separate issue of some complexity which we do not need to consider. The punitive action which we take is fully warranted by and based on the behavior dealt with above. It seems to us sufficient under the circumstances. We thus take no punitive action with respect to the prior criminal conviction.

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[8] The fact that marginal cases may be put does not indicate that the rule is unconstitutionally vague as regards situations clearly within its purview. *See United States* v. *Harriss*, 347 U.S. 612, 618 (1954).

[9] We also note that there is not involved here an infringement upon First Amendment rights, or a chilling effect upon such rights, such as prompted a considerably stricter application of the vagueness test in such cases as *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971) and *Baggett* v. *Bullitt*, 377 U.S. 360 (1964).

We make it clear, however, that the conviction of any member of this bar is a matter of grave concern and will lead to disciplinary action should the nature and seriousness of the offense warrant.

IV — Conclusion

For the reasons which we have explained above, we find that respondent has engaged in behavior which requires this court to take punitive action against him. Specifically, we find that the filing of nine petitions for review in immigration cases, some of which were not diligently pursued and none of which raised any substantial issue on review, which petitions caused automatic stays in deportation despite their lack of merit, and six of which petitions were filed after specific warning concerning the impropriety of such conduct, constitutes behavior "unbecoming a member of the bar of the court". Under the authority of F.R.A.P. 46 we have the power, and we feel, the duty, to impose appropriate disciplinary measures.

Respondent has not, for the past three years, used the processes of this court. Under the circumstances we suspend him as a member of the bar of this court until March 1, 1974 and impose a fine of $500, to be paid to the Clerk of the United States Court of Appeals for the First Circuit, who shall deposit the money received into the Treasury of the United States.



Adm. Office, U. S. Courts — Blanchard Press, Inc., Boston, Mass.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 71-1114 Original.

In the Matter of

SAMUEL A. DITKOFF

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JUDGMENT

Entered October 23, 1973

This cause came on to be heard on the amended petition for disciplinary action, testimony was taken and the case was argued by counsel.

Upon consideration thereof, It is now here ordered, adjudged and decreed as follows: Samuel A. Ditkoff is suspended as a member of the Bar of this Court until March 1, 1974, and is ordered to pay a fine of $500 to the Clerk of this Court for deposit into the Treasury of the United States within three weeks of the date of this order.

By the Court:

/s/ Dana H. Gallup
Clerk.

[Cert. cc: Clerk, U.S.D.C., Mass. and Mr. Barbsk and cc: Messrs.

-xx-

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

CA 75-4246

State of New York )
County of New York ) ss

Pauline P. Troia, being duly sworn, deposes and says that s he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the

5th day of March, 19 76 s he served a copy of the within respondents brief

by placing the same in a properly postpaid franked envelope addressed:

Claude Henry Kleefield, Esq.,
Suite 400,
100 West 72nd St.
New York, N.Y. 10023

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

5th day of March, 19 76

Ralph L. Lee

RALPH L. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977